Supreme Court, U.S.
FILED
AUG 24 2001
CLERK

No. 01-112

IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

FUJITSU LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

R. JEFFERY KELSEY
Managing Director, Litigation
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, TN 38125
(901) 434-8563
Counsel for Petitioner Federal Express Corporation

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1167
(202) 585-6900

JORDAN B. CHERRICK
THOMPSON COBURN LLP
One Firstar Plaza
St. Louis, Missouri 63101-1693
(314) 552-6000
Counsel for Petitioner Federal Express Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

5 pp

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

Fujitsu's brief in opposition ignores the Second Circuit's core holdings in the decision below. If this Court does not address those holdings, they will fundamentally disturb the operation of the Warsaw Convention.[1] The uniform worldwide operation of this treaty is important to the U.S. economy.

Fujitsu's brief relies exclusively on arguments that are tangential to the Second Circuit's decision, and those arguments confirm that the Second Circuit's decision below will contribute to confusion among shippers, insurers, and lower courts with respect to the operation of the Warsaw Convention's cargo rules. For example, Fujitsu asserts that the Convention requires the carrier to complete a new air waybill to return a shipper's goods to the shipper under either the original 1929 Warsaw Convention or The Hague Protocol.[2] Brief in Opposition at 2-3.

Fujitsu's candid analysis of the decision underscores its profound implications. Under the Second Circuit's decision, the original contract of carriage will not govern a return shipment, notwithstanding the provisions of both the air

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note (1994) (the "Convention"). For the Court's convenience, the text of the Warsaw Convention, including amendments, as it is currently in effect for the United States appears in Appendix D to FedEx's Petition for a Writ of Certiorari. The text of the original 1929 Convention appears in the Lodging Material at 1-19.

[2] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague, Sept. 28, 1955, 478 U.N.T.S. 371 ("The Hague Protocol"). The text of the Convention as amended by The Hague Protocol appears in the Lodging Material at 20-36.

waybill and the Warsaw Convention. Instead, according to Fujitsu, a shipper's request for a return of the goods triggers the need for an entirely new contract of carriage, subject *ab initio* to all of the Convention's requirements for a new shipment.

This leads to the manifestly absurd result—which Fujitsu concedes in its Brief in Opposition at 5-6—that under Article 33 of the Convention the carrier can exercise its right to refuse to enter into a contract to return the cargo. This leaves the carrier with the right to retain possession of goods that do not belong to it. This result contradicts settled expectations relating to the rights of shippers and carriers, and obviates the shipper/consignor's right to dispose of the goods under Article 12 of the Convention.

For example, a shipper would lose its right to demand the immediate return of emergency supplies rejected by its consignee. The carrier would have to insist on a new air waybill, and the decision of the court below provides no guidance as to which party has the duty to make out that air waybill. Where the shipment involves perishable goods or biological products, the damage from the delay might be irreparable. This result is simply untenable, particularly in the time-sensitive marketplace for express air services.

As FedEx explained in its petition, the decision of the court below will create chaos in the administration of the Convention's rules. The decision is inconsistent with the language of the Convention, well-established rights and responsibilities of carriers, and the manifest practicalities of the commerce they carry.

Fujitsu also contends that the archaic remedy it improperly seeks to invoke under the original Warsaw Convention has not been abated, because the original Warsaw Convention remains in force for countries that have not ratified either The

Hague Protocol or Montreal Protocol No. 4.[3] Fujitsu even asks the rhetorical question whether "the United States is no longer a 'High Contracting Party' to Warsaw." Brief in Opposition at 6.

This argument fundamentally mischaracterizes the question. Both The Hague Protocol and Montreal Protocol No. 4 apply their amendments only to international carriage of cargo between states party to those instruments.[4] Thus, the fact that the original Convention remains in force for countries party only to that instrument does not change the fact that the Protocols—as between countries that are party to them, *e.g.*, Japan and the United States—repealed, or abated, a court's power to grant Fujitsu the remedy it seeks. Courts cannot apply provisions of a treaty no longer in force between those countries. *See* Petition at 10-11.

In support of its argument, Fujitsu cites two cases, neither of which deals with the doctrine of abatement. Both cases, *Haver v. Yaker* and *U.S. v. Kodiak*, deal with the applicability of a treaty to private persons in the interval between the signing of the treaty and its mutual ratification, effecting an

---

[3] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 28, 1955, Sept. 25, 1975, TIAS No. _____, *reprinted in* ICAO DOC. No. 9148 (1975). The text of Montreal Protocol No. 4 appears in the Lodging Material at 37-43.

[4] *See*, The Hague Protocol, art. XVIII and Montreal Protocol No. 4, art. XIV, which by their terms apply the Amended Convention "to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping place in the territory of another State."

entry into force.[5] These cases are not relevant because the amendments reflected in The Hague Protocol and Montreal Protocol No. 4 are in force for both Japan and the United States.

CONCLUSION

The brief in opposition reflects the confusion that will be created by the decision below, and affirms the need for this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

R. JEFFERY KELSEY
Managing Director, Litigation
FEDERAL EXPRESS CORPORATION
3620 Hacks Cross Road
Building B, 3rd Floor
Memphis, TN 38125
(901) 434-8563
Counsel for Petitioner Federal Express Corporation

WARREN L. DEAN, JR.
Counsel of Record
PATRICIA N. SNYDER
THOMPSON COBURN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1167
(202) 585-6900

JORDAN B. CHERRICK
THOMPSON COBURN LLP
One Firstar Plaza
St. Louis, Missouri 63101-1693
(314) 552-6000
Counsel for Petitioner Federal Express Corporation

August 24, 2001

---

[5] Brief in Opposition at 8-9, citing *Haver v. Yaker*, 76 U.S. 32 (1869) and *United States v. City of Kodiak*, 132 F.Supp. 574 (D. Alaska 1955). Fujitsu's brief also cites to 87 C.J.S. *Treaties* § 14 to which the district court in the then-Alaskan territory referred, but that section now deals with conflicts between acts of Congress and treaties. The language cited by the court now appears in 87 C.J.S. *Treaties* § 8 (2000).